

*United States Court of Appeals  
for the  
District of Columbia Circuit*



**TRANSCRIPT OF  
RECORD**



United States Court of Appeals  
For the District of Columbia Circuit

485

No. 21,974

Grand Jury # 859-68

Rudolph N. Thornton  
Petitioner

v.

Honorable Howard F. Corcoran  
Respondent

United States Court of Appeals  
for the District of Columbia Circuit

FILED JUL 25 1968

*Nathan J. Paulson*  
CLERK

Brief of Saint Elizabeths Hospital,  
Amicus Curiae

Statement

In its order of July 9, 1968, in the above matter, this court, sua sponte invited Saint Elizabeths Hospital to submit its views on the desirability and feasibility of (1) permitting defense counsel and independent psychiatrists to be present at staff conferences which determine the Hospital's recommendations concerning competence to stand trial and mental condition at the time of the alleged offense; (2) permitting transcription, by audio or video tape, of staff conferences for use by defense counsel and independent psychiatrists not present at such conferences; and (3) establishing any other procedures for assuring that defense counsel are able to effectively cross-examine Hospital personnel at trial concerning their participation in the staff conference.

By a companion order of July 9, 1968, in this case, the court directed the Hospital to hold its staff conference concerning petitioner, without awaiting the disposition of his petition for a Writ of Mandamus directed to the respondent requiring him to permit counsel and an independent psychiatrist to be present at the staff conference, and to record such conference on audio tape, such recording to be sealed and kept in the sole custody of the Hospital until further order of this court.

The petitioner's commitment to the Hospital was extended up to and including July 30, 1968 by the order of the District Court filed June 21, 1968, in United States of America v. Rudolph Thornton, which order was consented to by the attorney for the petitioner.

In the present posture of this proceeding, and in light of the views of the Hospital hereinafter set forth, on July 18, 1968, a motion was filed on behalf of Saint Elizabeths Hospital requesting relief from the court's companion order of July 9, 1968, and for permission to return appellant to his pre-trial status pending the outcome of this proceeding. However, the court is assured that if said motion is denied, a conference, in full compliance with the July 9 order of this court, will be held prior to the expiration of the period of petitioner's authorized commitment to the Hospital.

Turning to the questions on which the Hospital has been asked to comment, we think it would be helpful to the consideration of these matters

to set out the procedures underlying and involved in the Medical Staff Conference.

The Medical Staff Conference as an Integral Part of the Medical Examination. 1/

A patient committed to the Hospital under 24 D. C. 301 for a pre-trial mental examination is, upon admission, assigned to a ward and placed under the supervision of the staff psychiatrist responsible for that ward. Under the supervision of the Clinical Director, 2/ the Staff Psychiatrist interviews the patient, and directs the investigation and tests necessary for his evaluation of the patient.

If the Staff Psychiatrist, after his evaluation of the patient, concludes that the patient's condition is obvious--e.g., the patient is clearly psychotic--he will, with the approval of the Clinical Director, recommend his diagnosis and appropriate findings without a staff conference. Upon approval by the Clinical Director and the Superintendent, the

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1/ The following discussion is specifically directed to persons charged with felony and assigned to the John Howard Service of Saint Elizabeths Hospital for examination pursuant to an order of commitment under 24 D. C. Code 301. Similar procedures, however, are followed in other sections of the Hospital in carrying out the pre-trial mental examinations of accused persons.

2/ At present, Dr. Mauris M. Platkin is the Acting Clinical Director for the John Howard Service.

recommendation becomes the finding upon which the report to the court is based. The consultation with the Clinical Director in such case is informal.

In many of the cases, however, the matter proceeds to staff conference in the discretion of the Clinical Director depending on his judgment of whether group discussion would be helpful. The usual medical participants at the staff conference are the Clinical Director (or, in his absence or unavailability, a staff psychiatrist designated by him) who presides over the conference and the Staff Psychiatrist who has been evaluating the patient. In addition, the psychologist and psychiatric social worker who have been involved in the case are invited to be present. Where a case presents difficult, complex, or unusual problems, another member of the psychiatric staff may be asked to participate. 3/

The conference begins with only the Hospital personnel present. The Staff Psychiatrist summarizes the patient's history, which includes his entire medical history and the results of all medical examinations conducted in the Hospital, as well as observations by mental health workers

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3/ While in the past, a greater number of psychiatrists were involved in staff conferences, the present patient load has made such broad participation impractical. There are now 59 psychiatrists serving 7186 patients at the Hospital. Of these, 6 psychiatrists are responsible for serving 413 patients in John Howard Service.

made during the patient's stay in the Hospital. This oral presentation is based on a written summary prepared by the Staff Psychiatrist for every case and is part of the patient's file which is available to the defense attorney.

The psychologist presents and interprets his observations. The report of the psychiatric social worker's investigation is next presented. These reports are also in written form and part of the file, and are available to the defense attorney.

In addition, the "ward jacket" is presented. This consists of the regular notes and observations made by the ward nursing personnel of the patient's behavior and responses and is available to defense attorney.

After the presentations, and discussions of them, are concluded, the patient is brought in. The purpose of the conference is explained to him by the Presiding Officer and the patient is advised that the only question with which the conference is concerned is his mental condition. He is also told that any evidentiary matter elicited during the conference relating to the patient's involvement in the offense with which he is charged will be kept confidential and will not voluntarily be divulged except to his own counsel. In many cases, the patient may be in an anxious state, and the preliminary part of the conference is intended to help put him at ease and assure his participation.

The Presiding Officer then conducts a psychiatric interview of the patient, which touches, among other aspects, on his orientation, contact with the environment, his behavior, and his ability to respond rationally to questions. The interview lasts until the members of the conference are satisfied that a sufficient examination has been made.

At the conclusion of the questioning, the patient is then given the opportunity to offer any additional information or to raise any questions and is thereafter excused.

The conference participants then discuss their views on the diagnosis and other pertinent findings. Where only two psychiatrists participate in the conference, and there is a significant disagreement on the diagnosis and pertinent findings, the Clinical Director may request an additional, preferable a senior, psychiatrist to review the file, and, after an interview of the patient, to report his recommendation. His report is then incorporated in the conference report and will be considered by the Presiding Officer in preparing the official diagnosis and findings.

The conference proceedings are not recorded--either stenographically or by audio or video tape. The Presiding Officer may make limited notes to assist him in the preparation of the "Medical Staff Conference Report" which includes his evaluation of the patient. A copy of a sample report,--one in which there was a disagreement at the conference--, with the name of the patient deleted, is attached hereto for the

information of the court. Such report on any given patient is available to the defense attorney.

This report is signed by the Presiding Officer of the conference and forwarded to the Superintendent. Upon his approval and signature of the report, a letter report of the official diagnosis and findings is made by the Superintendent to the Clerk of the Court, with copies to the attorneys involved.

Function of the Conference and Role of the Hospital

In the milieu of a psychiatric hospital, medical personnel informally discuss their patients with their colleagues and seek advice from senior psychiatrists on difficult problems. The Clinical Director may examine a patient individually at the request of the Staff Psychiatrist.

The Medical Staff Conference is merely an extension of this day to day informal consultation. It provides for formal consultation by the Staff Psychiatrist with a responsible senior officer on the diagnosis and findings. This structured consultation provides for a full presentation and review of the patient's case, based on his entire history, including his behavior during the present hospitalization and his responses and behavior at the conference. The conference is then one method the Hospital may use to assure the goal of an objective, impartial, and medically sound evaluation of the patient.

Although Saint Elizabeths Hospital is a Federal Hospital operated by the Department of Health, Education, and Welfare and its staff are government employees, the Hospital does not consider itself an antagonist in the adversary proceedings involving the patient and is neither on the side of the defendant nor on the side of the prosecutor. In conducting the examination the Hospital does not seek to establish facts favorable for the defense attorney's case or for the case for the prosecution. The inquiry into the patient's mental condition does not involve passing moral judgments on the conduct of the patient and is entirely objective. The Hospital thus views its function as that of rendering assistance to the court by furnishing reliable medical opinion on the mental state of a defendant by experts engaged neither by the prosecution nor by the defense.

This position taken by the Hospital regarding its relationship to the court and to the patient is in accord with that taken by the majority of courts who have had occasion to review the role of government psychiatrists under statutes providing for commitment of an accused for pre-trial mental examination.

McGarty v. O'Brien, 188 F 2d 151, 155 (1st Cir. 1951); State v. Myers, 220 S.C. 309, 67 S.E. 2d 506, 507 (1951); Commonwealth v. Cox, 327 Mass. 609, 100 N.E. 2d 14 (1951); State v. McManus, 187 La. 9, 174 So. 91, 93 (1937); 32 ALR 434, 451.

The presence of a patient at such a conference cannot reasonably be considered a "confrontation" of an accused with his accusers and the examination is not, by its nature, method, or objective an accusatory proceeding. It is as much as part of the examination and the evaluation of the patient as the conversation of the staff psychiatrist with the patient or his informal discussion of such a conversation with another psychiatrist.

The conference is a part--admittedly an important part in cases where it is used, but nevertheless only a part--of a process which begins with the patient's admission to the hospital, through the observations and tests which are made, and the formulation of judgments which are then tested in the give and take of the conference.

The discussion at the conference is full, frank, and uninhibited, as it should be between members of the same profession on the same staff. It is designed to give the utmost freedom for a broad consideration of all pertinent information and judgments available to assure that the Hospital's responsibility is objectively discharged through the frank interplay of professional judgments.

Any influence on the conference which interferes with or inhibits the full and free expression of views and information, or full and free answers by the patient, in our view impairs its medical function and diminishes its value as part of the psychiatric examination of the

patient and concomittantly adversely affects the performance of the Hospital's function.

We now turn, in the light of the above discussion, to the specific questions put by the Court.

I. The Presence of Counsel and Non-Hospital

Psychiatrists or the Recording or Filming of  
the Staff Conference Would Impair the Function of  
the Conference

In connection with the first two questions, it should be noted that a significant element in the Hospital examination procedure is the establishment of a rapport with the patient necessary to a meaningful medical examination. The modern psychiatric interviewing procedure, although it includes questions, puts much more emphasis on a free-flowing exchange between interviewing psychiatrist and patient. The presence at a conference of the patient's counsel, representing him in the criminal proceeding, whether alone or with a psychiatrist, in our opinion cannot help but be interpreted by the patient as cautioning him against too freely responding to questions put to him by the Presiding Officer. The patient has, as this Court is aware, a reliance on his attorney, and, consciously or unconsciously, will try to say what he believes will be approved by his counsel.

The introduction of recording and of filming equipment, the presence of technicians to operate such equipment, and the interruptions during the conference that would be necessary for replacing recording tape or film would violate one of the most important principles of psychiatric interviewing, - that the interview should be conducted in a setting that will assure as much privacy for the patient as possible and will assure that the patient not be distracted or the interview interrupted just as the patient and the interviewer have entered into a meaningful exchange. To this point, Ian Stevenson and William Shipps writing on the Psychological Examination in "A Manual for Psychiatric Case Study" (Gunn, N.Y. 1952) (p. 218) state, as far as the setting for an interview is concerned, that surroundings which might be interpreted as threatening:

"may induce such severe anxiety as to obscure other aspects of the patient's psychological state. The setting and the circumstances, therefore, acquire their importance from the effect they may have on the patient."

Also, the introduction of recording equipment,--microphones and tape recorder--, or filming equipment,--microphones and camera--, will, of course, be explained to the patient as intended to preserve a record of everything said at the conference, a record which will be available to the defense counsel and to the prosecution. This warning, which we think

must be given the patient, would, in our judgment, erect a barrier between the interviewer and the patient and render the patient's responses of doubtful clinical reliability.

The restraining effect of counsel's presence, or of defense psychiatrist's presence, would inhibit staff discussion of the case. The knowledge that defense representatives are present to permit the gathering of material for cross-examination cannot but prove an obstacle to the carrying on of the type of discussion necessary to the formulation of a difficult and sometimes controversial judgment.

For a like reason, the recording or filming of the staff discussion at a medical conference would obstruct the presentation and free exchange of views since the knowledge is inescapable that the record will be carefully scanned, or listened to, as the basis for attack, either by the United States Attorney or by the defense counsel, --depending on whether the conference finding is that the defendant is with mental disorder or without mental disorder. The inevitable tendency in such situation, would be to speak for the record rather than to exchange views.

In summary, then it is our view that the presence of representatives of the defendant, whether they be his counsel or his psychiatrist, alone or together, at a medical staff conference, or the audio or video recording of the conference to be made available to the adversaries in the criminal

proceeding is incompatible with the nature and the purpose of the conference and would impede the effective discharge of the Hospital's responsibilities in these cases. 4/

II. Provision of Information Adequate for Cross-Examination of Staff Conference Participants.

The third question of the Court requests our views on procedures which would assure that defense counsel have information adequate for effective cross-examination of participants at staff conferences.

As we have already indicated, the presence of defense representatives at the conference, or the recording of the conference, is considered undesirable and not feasible if the conference is to serve its purpose in the discharge of the Hospital's responsibility. We must point out, however, that hospital staff, in the past, have freely discussed the conference proceedings with defense attorneys in informal discussions, and we expect that practice to continue. In addition, all Hospital personnel whose observations are included in the patient's file are available for similar discussions.

Moreover, the Medical Staff conference report, which, as the attachment indicates, is a far more comprehensive document than the

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4/ While we have made no cost estimate of the use of audio or video recording of every staff conference, it is clear that the additional expense involved would need to be included in future appropriation requests.

letter report, has always been available to counsel, as has the patient's complete clinical file and "ward jacket".

Since a staff conference for petitioner has not yet been held, we cannot, of course, specify in detail what a report of such conference would contain. Recognizing, however, the needs of the Court in the trial of criminal cases, the Hospital will be glad to consult with such persons or groups as the Court may direct to develop, as soon as possible, guidelines for staff conference reports which will serve the needs of the Court and of counsel, both for defendant and for the prosecution, in this and future cases, while preserving the character of the staff conference as a desirable clinical procedure.

Respectfully submitted,

/s/ David W. Harris, M.D.  
David W. Harris, M.D.  
Acting Superintendent  
Saint Elizabeths Hospital

/s/ Winifred M. Nash  
Winifred M. Nash  
Attorney, Public Health Division  
Office of the General Counsel  
Department of Health, Education, and Welfare

/s/ Sidney Edelman  
Sidney Edelman  
Deputy Chief, Public Health Division  
Office of the General Counsel  
Department of Health, Education, and Welfare

CERTIFICATION OF SERVICE

I hereby certify that a copy of the brief filed by Saint Elizabeths Hospital, as amicus curiae, in this case, was personally served upon the office of attorney for petitioner, Allan M. Palmer, Esq., 1737 DeSales Street, N. W., Washington, D. C. 20030, upon the office of the Honorable David G. Bress, United States Attorney, United States Courthouse, Washington, D. C., 20001, and upon the office of William H. Allen, Esq., 701 Union Trust Building, Washington, D. C. 20005, who was also invited by the court to file a brief as amicus curiae, this 25th day of July, 1968.

/s/Sidney Edelman  
\_\_\_\_\_  
Sidney Edelman

CLINICAL RECORD

Report on MEDICAL STAFF CONFERENCE

or

Continuation of S. F.

(Strike out one line) (Specify type of examination or date)

(Sign and date)

Dr. Mauris M. Platkin - Acting Clinical Director  
by

MEDICAL STAFF CONFERENCE (DIAGNOSIS)

Present: Doctors Platkin and Harman; & Dr. Stammeyer (Psychologist).

██████████ is a 37-year-old man who was admitted to the Hospital ██████████, under a conventional order of commitment charged with first degree murder which allegedly occurred on or about ██████████.

██████████ is a fairly neat and pleasant looking man who comes to the interview quite willingly. He wears a currently stylish chin beard. He is in excellent contact, relates quite well during the interview, talking at great length about various matters under discussion and generally leaves the impression that he is giving an honest account of various matters reviewed. He is fully aware of the charges against him and provides in considerable and in minute detail the chain of circumstances that led to the killing of his girl friend. There appears to be only one difference between his version and that which is a matter of record, and that is that he understood that he had stabbed his girl friend 39 times whereas the record refers to 32 times. At no time does he attempt to absolve himself of any responsibility of the death of the lady. He denies any involvement with alcohol or drugs at the time or any other condition other than his own emotions that got him involved in the situation. He has given his version of what happened to both Dr. Harman and Dr. Stammeyer and at the present conference he repeats his story with little or no variation from what he has previously provided.

In short, ██████████ tells the following story of what occurred, leading to the murder of his girl friend. On the Saturday before the murder occurred he and his girl friend had argued because she had come home from work some 4 or 5 hours late which was unusual for her. He interrogated her rather closely and apparently she presented a couple of lies as to where she had been. He denies that he suspected her of any misconduct but could not understand why she had been late and why she did lie about it. As a result of this, a considerable degree of arguing ensued during which he slapped her and then left the house. On the way back to the house it appeared that his girl friend had called the police and when they accosted them he explained the situation and was simply warned to cool off and that was the end of that. However, he was still pretty much angered by the whole situation and a couple of hours later he came back to the house knowing that his girl friend and her sister, who had come over, had left the house, taking her girl friend's children. He therefore went into the house, squirted some lighter fluid on some pieces of newspaper which he distributed around the house (Continue on reverse side) and set fire to them and understood subsequently that considerable damage had been done. He then went home and for the

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

REGISTER NO.

WARD NO.

JH

SAINT ELIZABETES HOSPITAL

MEDICAL STAFF CONFERENCE  
REPORT ON \_\_\_\_\_ OR CONTINUATION OF \_\_\_\_\_

Standard Form 507  
507-104

CLINICAL RECORD

Report on

or

Continuation of S. F. MEDICAL STAFF CONFERENCE-II

(Strike out one line) (Specify type of examination or date)

(Sign and date)

next day, that is Sunday, he was considerably upset and agitated about the situation. On Monday he asked for some 12 hours annual leave from his job because he was so upset and felt he couldn't be effective at work. He states he had no particular plans in mind, but simply wandered around rather aimless and bitter. Then in an attempt to somehow work the problem out with his girl friend he went to the police and asked them to take him to his girl friend's house. They refused because they felt they had no justification for doing so for him. He continued to wander around, felt increasingly violent and angry and felt that he wanted to do something physical like "tearing something up." He then went over to the neighborhood where his girl friend's mother lived and seeing her in the yard outside her house approached her and holding a knife to her throat demanded that she tell him where his girl friend was. She suggested he come into the house to talk the thing over which he did. A younger sister of his girl friend was there, too. He then threatened her with a knife, demanding that she take him to where his girl friend was staying. He said he threatened to kill her if she did anything out of the way. At the present Conference he confirms that the way he felt at the time he certainly would have killed her if she tried anything like running away, screaming, or forewarning his girl friend. They came to the door of the house where his girl friend was staying, the sister knocked at the door and in response to her voice the door was opened. She walked in and Mr. Carr walked in right behind her. At this point, his saw his girl friend flee into a bedroom and another girl in the house immediately follow her there. He followed the second girl and when he came into the bedroom the second girl left, and thus he was alone with his girl friend. He states from this point on everything was confusion to him until he found himself out in the street again. He states that he specifically knows that when he entered the house he had a knife in his pocket. He does not recall taking his knife out; indeed, he does not recall whatever happened to the knife. At any rate, he found himself walking up and down an alley and a passerby noticing a lot of blood on him made some appropriate comment about it. He looked at his bloody clothing and then walked over to a nearby service station where again some comments were made. At this point he called the police and told them to come and get him and waited until they did.

Considerable effort was expended in interrogation to determine how much [redacted] remembered of the actual stabbing. Insistently, he says he remembers nothing. When he discovered later that he was alleged to have stabbed her some 39 times, he states that he finds difficulty believing this because to the best of his recollection he was hardly in the house long enough for him to have stabbed her so many times. Even 32 seems to him like a big figure; however, he consistently denies that there is a blank period from the time he entered the bedroom with his girl friend until he found himself out in the street. Once or twice during the interview his voices wavered and he seemed (Continue on reverse side) on the verge of sobbing but he

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

REGISTER NO.

WARD NO.

JH

[redacted] SAINT ELIZABETH'S HOSPITAL

REPORT ON \_\_\_\_\_ or CONTINUATION OF MEDICAL STAFF CONFERENCE-II  
Standard Form 307 507-104

CLINICAL RECORD

Report on \_\_\_\_\_  
or  
Continuation of S. MEDICAL STAFF CONFERENCE-III  
(Strike out one line) (Specify type of examination or date)

(Sign and date)

re-called rather quickly, dabbed at his eyes and proceeded with the Conference.

[redacted] acknowledges that he and [redacted] the name of his girl friend, had frequently argued for one reason or another. Most of their arguments were about domestic problems, spending, keeping the house clean and so forth. He denies that either of them had ever accused the other of infidelity. He states in 1954 he was involved in a very similar situation when involved in an argument he cut her up badly with a knife. The FBI record shows that in [redacted] he was charged with "malicious wounding" in Richmond, Virginia, for which he received a 3-year sentence of which he did about half. He states he always carries a knife around with him for "protection" though he is not clear as to what he needs to protect himself from. He states he has a low temperamental boiling point and that he is rather easily aroused in fights, which he gets into from time to time. Thus he feels the need to keep himself prepared for any fight he might get into.

His record shows that he has been something less than an angel in the past, having a record that involves being a fugitive from the Army, 1951, and a number of violent assaults and attacks since then. He states to the present Conference that he used to get involved in armed robberies but during his last stay at the penitentiary people were quite enough interested in him, to the extent even of getting him a job with the Department of Corrections which job he was working at and behaving himself at the time the present situation occurred.

The psychological studies show a full scale IQ of 95, potential somewhat higher, perhaps in the high average range. There is nothing bizarre or psychotic to be seen but he seems to be poor at sustaining concentration, he displays anxiety, inner emotional turmoil, particularly when talking about the crime. Basically he appears to be an independent individual who lacks self-determination showing free-floating anxiety; agitation, anger, hostility and in the opinion of the psychologist some neurotic features. He is, in sum, described as an emotionally unstable individual of psychoneurotic features.

In view of the fact that this patient is charged with a capital offense, he would ordinarily have been seen three psychiatrists at the Staff Conference. Since this was not feasible at the time, the patient was subsequently referred to Dr. Weickhardt as the "third" member of the Conference. Dr. Weickhardt therefore studied the record and interviewed the patient for an hour and a half.

He has now verbally reported his findings to me which are therefore herein incorporated in the present Staff Conference. It is the opinion of Dr. Weickhardt, along with the senior member of the present Staff Conference, that this patient is without mental disorder at the present time and that he was so on or about

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

REGISTER NO.

WARD NO.

JH

REPORT ON \_\_\_\_\_ or CONTINUATION OF MEDICAL STAFF  
CONFERENCE-III  
Standard Form 307  
307-104

SAINT ELIZABETH'S HOSPITAL

CLINICAL RECORD

Report on

or

Continuation of S. F. MEDICAL STAFF CONFERENCE-IV  
(Strike out one line) (Specify type of examination or date)

(Sign and date)

[REDACTED]. In discussing the situation with Dr. Weickhardt, it appears that [REDACTED] gave him essentially the same information that he supplied to us at our Conference so that Dr. Weickhardt's opinions are based on the same sources.

In view, then, of the foregoing history, clinical picture, and psychiatric evaluation, it is the sense of this Conference that the following findings should obtain.

DIAGNOSIS: 90.0 WITHOUT MENTAL DISORDER.

COMPETENCY: HE IS COMPETENT FOR TRIAL.

CONDITION  
ON  
DISCHARGE: WITHOUT MENTAL DISORDER.

REMARKS: IN OUR OPINION [REDACTED] WAS NOT SUFFERING FROM  
MENTAL DISEASE OR DEFECT ON OR ABOUT [REDACTED]  
[REDACTED]

Maurice W. Roth  
Acting Clinical Director

Arthur D. Johnson  
Acting Superintendent

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

[REDACTED] [REDACTED]

REGISTER NO.

WARD NO.

JH

SAINT ELIZABETH'S HOSPITAL

REPORT ON \_\_\_\_\_ or CONTINUATION OF MEDICAL STAFF  
Standard Form 507 CONFERENCE-IV  
507-104

United States Court of Appeals  
For the District of Columbia Circuit

Rudolph N. Thornton )  
Petitioner ) No. 21,974  
v. ) Grand Jury 859-68  
Honorable Howard F. Corcoran ) (Criminal No. 884-68)  
Judge of the United States )  
District Court for the )  
District of Columbia )  
United States Court of Appeals )  
for the District of Columbia Circuit )

**FILED** NOV 5 1968

SUPPLEMENTAL MEMORANDUM FOR  
SAINT ELIZABETHS HOSPITAL,  
AMICUS CURIAE

*Nathan J. Paulson*  
CLERK

Under date of October 17, 1968, this Court entered an order which, among other things, directed the District Court to direct Saint Elizabeths Hospital to accord to petitioner a staff conference with the incidents directed in this Court's order of July 9, 1968.

On October 17, 1968, the District Court entered an order to such effect.

The attached report of Saint Elizabeths Hospital, concerning action taken pursuant to the District Court's orders of October 17,

[ 2 ]

and April 23, 1968, has been filed in the case below and is submitted for the information of this Court.

Respectfully submitted,

Sidney Edelman

Sidney Edelman  
Deputy Chief, Division of Public Health  
Grants and Services  
Office of the General Counsel  
Department of Health, Education and  
Welfare  
Counsel for Saint Elizabeths Hospital

Certificate of Service

I hereby certify that a copy of the foregoing was mailed to the Honorable David G. Bress, United States Attorney, United States Court House, Washington, D. C. and to Allan M. Palmer, Esq., 1737 De Sales Street, N. W., Washington, D. C. 20030 this 28th day of October, 1968.

Sidney Edelman

Sidney Edelman

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA : Criminal No. 884-68

v. :

RUDOLPH N. THORNTON :  
|

REPORT BY SAINT ELIZABETHS HOSPITAL OF ACTION TAKEN  
PURSUANT TO ORDERS OF OCTOBER 17, 1968 AND APRIL 23, 1968

This report of action taken by Saint Elizabeths Hospital as directed by this Court's orders of October 17, and April 23, 1968 is respectfully submitted for the information of the Court.

ORDER OF OCTOBER 17, 1968

The order of October 17, referred to above vacated this Court's finding of August 16, 1968, to the effect that the defendant has sufficient present ability to consult with his counsel with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. It further ordered that the certificate of the Superintendent of Saint Elizabeths Hospital dated July 30, 1968 heretofore filed, which advised that the defendant was competent to stand trial, be returned to the Superintendent. Such certificate was received by the Hospital on October 21, 1968 together with a

copy of the order.

The Court further ordered that "the Superintendent of Saint Elizabeths Hospital cause to be held without delay a staff conference concerning the mental competency for trial and responsibility of the petitioner, such conference to be recorded on audio tape to be retained in the custody of the Hospital until further order of the United States Court of Appeals for the District of Columbia."

Pursuant to this direction, and since the defendant was not in the custody of the Hospital, the Hospital made arrangements through Allan M. Palmer, Esq., attorney for the defendant, for the defendant to appear voluntarily at the Hospital at 10:30 a.m., Thursday, October 24, 1968, for the purpose of a staff conference.

Such conference was held at the time and place stated and recorded on audio tape. The recording has been sealed and will be retained in the sole custody of Hospital until further order of the Court.

The Hospital is, however, uncertain as to whether it is required at this time to file a report on the defendant's mental condition as directed by the April 23, 1968 order (discussed below) or is to await the further order of the court on this question.

A brief summary of the proceedings in this case, insofar as they

involve the Hospital, may be helpful in understanding the dilemma confronting the Hospital.

SUMMARY OF PROCEEDINGS

On April 23, 1968, the defendant was committed to Saint Elizabeths Hospital for a period not to exceed sixty days<sup>1/</sup> for examination. The commitment order further directed, insofar as here pertinent, that the Hospital report to the Court:

"(1) Whether the defendant is presently mentally competent to understand the proceedings against him and to properly assist in the preparation of his defense herein; and

"(2) Whether the defendant, at the time of the alleged criminal offense, committed on or about March 9, 1968 was suffering from a mental disease, or defect which substantially affected his mental or emotional processes and substantially impaired his behavior controls, and if so, whether his criminal act was the product of his mental condition . . ."

Pursuant to this order, the defendant was admitted to the Hospital on April 25, 1968 and there hospitalized for mental observation and examination until July 30, 1968 at which time he was returned to the Court together with a report on his mental condition.

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1/ By order of the Court, filed June 21, 1968, this period was extended to and including July 30, 1968.

2/

On May 27, 1968, the defendant filed a petition with the United States Court of Appeals for the District of Columbia for a writ of mandamus directed to the Honorable Howard F. Corcoran requiring him to permit counsel and an independent psychiatrist to be present at the Saint Elizabeths staff conference to be held in this case or, in the alternative, to permit counsel to attend alone. The Hospital was not a party to the proceeding and did not appear therein.

On July 9, 1968, the Court of Appeals, sua sponte, issued two orders in the proceeding before it directed to Saint Elizabeths Hospital.

One order invited the Hospital, as amicus curiae, to submit its views on the desirability and feasibility of (1) permitting defense counsel and independent psychiatrists to be present at staff conferences which determine the Hospital's recommendations concerning competence to stand trial and mental condition at the time of the alleged offense; (2) permitting transcription, by audio or video tape, of staff conferences for use by defense counsel and independent psychiatrists not present at such conferences; and (3) establishing any other procedures for assuring

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3/ A motion for similar relief was denied by the District Court on May 3, 1968.

that defense counsel are able to effectively cross-examine Hospital personnel at trial concerning their participation in the staff conferences.

The companion order, also issued sua sponte by the Court of Appeals, after reciting the need for further consideration of the mandamus petition, directed the Hospital to hold its staff conference concerning petitioner without awaiting the disposition of his petition, and further ordered that the Hospital record the conference on audio tape, such recording to be sealed and kept in the sole custody of the Hospital until further order of the Court.

On July 18, 1968, the Hospital filed a motion requesting relief from the latter order. On July 25, pending a ruling on this motion, the Hospital brief as amicus curiae, was filed. The views of the Hospital on the questions posed by the Court of Appeals were summarized in the brief by the statement that the presence of representatives of the defendant, whether they be his counsel or his psychiatrist, alone or together, at a medical staff conference, or the audio or video recording of the recording of the conference to be made available to the adversaries in the criminal proceeding would be "incompatible with the nature and purpose of the conference and would impede the effective discharge of the Hospital responsibilities in these cases."

The statement in our brief, assuring the Court that, if our motion of July 18, 1968 were denied, a conference would be held in full compliance with its July 9 order, was not intended to express a medical opinion as to the need for a staff conference in this case nor to constitute an undertaking that such a conference would be held contrary to medical opinion as to its need.

Indeed, on July 18, 1968 when the motion requesting relief from the July 9 order of the Court of Appeals was filed on behalf of the Hospital, and on July 25, when the Hospital's brief as amicus curiae was filed, no decision had in fact as yet been made as to the need for a staff conference.

In our brief, we pointed out that the holding of a staff conference was discretionary and that the need for such a conference was determined on a case by case basis. Of some 570 reports made to the courts of the District of Columbia since January 1, 1968 with respect to persons committed under 24 D. C. Code 301, 300 reports were made after a staff conference, and approximately 270 were made without a staff conference.

The Hospital understood the July 9 order as applying only if the Hospital decided that a conference was called for as a

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4/ Approximately one-fourth of the cases reported to the District Court were reported without a staff conference.

matter of medical judgment. This understanding was confirmed, we thought, by the language of the order of the Court of Appeals, entered July 26, 1968, which denied our motion for relief from its July 9 order, and contained the following statement:

"Circuit Judge Burger desires to record his understanding that this order is not intended and is not to be construed as implying any requirement that a staff conference be held by the staff of Saint Elizabeths Hospital, but only that when and if a conference is held, it is to be recorded subject to further order of the Court as to what use, if any, may be made of such recordings."

With this understanding, Dr. David W. Harris, Acting Superintendent of the Hospital, decided on July 29 that a staff conference was medically unnecessary in this case and so noted in the defendant's clinical file. The report of July 30 was accordingly made in compliance with this Court's order of April 23,  
5/  
1968.

By its memorandum order entered on September 20, the Court of Appeals enlisted the aid of the District Court to rectify whatever misunderstanding occurred with respect to the import of

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5/ Although, as set out above, a staff conference has been held and recorded on audio tape as directed by the Court, the Hospital is still of the view that a staff conference in this case was and is medically unnecessary and further, that the recording of the conference is incompatible with the nature and purposes of the conference for the reasons set forth in our amicus curiae brief.

its order of July 9, 1968 concerning the holding of a staff conference.

In its order entered October 17, 1968, the Court of Appeals sua sponte, modified its memorandum order of September 20 to direct the District Court (1) to proceed to cause the petitioner to be placed in the same position he was in prior to the certification by the Hospital authorities to the District Court that he was competent to stand trial, and (2) to direct that the Hospital accord to petitioner a staff conference, with the incidents directed in this Court's order of July 9, 1968.

This order, as well as the October 17 order of this Court directing that the certificate of the Superintendent of the Hospital dated July 30, 1968 be returned, is silent as to compliance with the April 23 order committing the defendant to Saint Elizabeths Hospital and requiring a report on his mental condition.

ORDER OF APRIL 23, 1968

Despite our uncertainty as to the present status of the April 23 order of this Court, in order to expedite the proceedings the Superintendent of the Hospital is filing with the Clerk of the District Court a report concerning the mental condition of the patient as called for by such order.

Respectfully submitted,

*Sidney Edelman*

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Deputy Chief, Division of Public Health  
Grants and Services  
Office of the General Counsel  
Department of Health, Education, and  
Welfare

Counsel for Saint Elizabeths Hospital

October 25, 1968

BRIEF FOR WILLIAM H. ALLEN AS AMICUS CURIAE

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,974

---

RUDOLPH N. THORNTON,

Petitioner

v.

HONORABLE HOWARD F. CORCORAN,  
Judge of the United States  
District Court for the  
District of Columbia,

Respondent

---

United States Court of Appeals  
for the District of Columbia Circuit

FILED JUL 30 1968

*Nathan J. Paulson*  
CLERK

On Petition for a Writ of Mandamus

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Amicus Curiae  
(By Invitation of this Court)

July 26, 1968

IN THE  
UNITED STATES COURT OF APPEALS  
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On Petition for a Writ of Mandamus

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BRIEF FOR WILLIAM H. ALLEN  
AS AMICUS CURIAE

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By order of July 9, 1968, this Court invited  
the undersigned to submit a brief as amicus curiae setting  
forth his views on certain questions arising from petitioner's  
request that his counsel and a psychiatrist of his choice  
be allowed to be present at the staff conference at Saint  
Elizabeths Hospital at which petitioner's case will be

considered. The staff conference is the usual culmination of a defendant's stay in Saint Elizabeths for the purpose of a pre-trial mental examination. Unless the diagnosis is obvious, it is at the staff conference that the hospital's opinions concerning an accused's competence to stand trial and his mental condition at the time of the commission of the alleged offense are finally formulated. The Court's order requested amicus' views on "the desirability and feasibility" of permitting defense counsel and an independent psychiatrist to be present at such a staff conference, of permitting transcription of the conference for use by defense counsel, and of other procedures for ensuring effective cross-examination of staff conference participants at the trial.

As the Court's order of July 9 notes, the undersigned is chairman of the committee of the Judicial Conference of the District of Columbia charged with carrying out the recommendations of Conference's Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial. He was also a member of the latter committee. This brief represents solely the views of the undersigned. Although he has consulted with members of

his current committee, there has been no attempt to arrive at a consensus or any kind of committee view. As for the original pre-trial mental examination committee, one of its recommendations, which was adopted by the Judicial Conference, was that "the ordering or conduct of a statutory mental examination should be made impermissible unless at the time of the order and during the period when the examination is conducted the accused is represented by counsel." In the text of its report the committee explained that it did not mean by the recommendation "that counsel need or should be present when the accused is being examined." Report of the Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial 54, 82 (1965). The committee had in mind the entire examination process and did not focus at any point in its report narrowly on the question now raised by petitioner of having his counsel and an independent psychiatrist present at the staff conference.

I.

The Court has not requested amicus' views on the constitutional and other legal principles that petitioner contends require the grant of his request for

the presence of defense counsel and an independent psychiatrist at the Saint Elizabeths Hospital staff conference. These principles are ably set forth in petitioner's memorandum of law. Petitioner's principal reliance is of course on United States v. Wade, 388 U.S. 218 (1967). Amicus curiae will not deal with these matters at any length, but there are aspects of Wade, relevant here, that neither party's memorandum makes plain.

Wade, first of all, involved compulsion of the accused. Here, the psychiatric examination at Saint Elizabeths Hospital is, it is true, being conducted pursuant to a court order, but the order was entered on the accused's motion. In short, he asked for the examination. Amicus believes this to be a relevant consideration, although to hold that by requesting the examination the petitioner has waived whatever rights he would otherwise have under the Sixth Amendment would not resolve all cases since examinations under 24 D.C. Code § 301 can be ordered on the prosecution's motion or by the court sua sponte. See Report, supra at 21-24. Moreover, the doctrine of waiver seems inapt to the realities of the situation since what the petitioner is seeking here is a means of

making the mental examination he has asked for as effective an instrument as possible for his defense.

In Wade, the Court declared that the Sixth Amendment guaranty of right to counsel assures an accused that he need not stand alone against the Government "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. at 226. The situation here is different. The psychiatrists at Saint Elizabeths Hospital, while employees of the United States Government, are by order of the court ordering the examination, as well as by their professional oath, required to be impartial; they are not a part of the prosecutorial apparatus.<sup>1/</sup> As amicus understands, the prosecutor is not present at the staff conference. Indeed, to have the prosecutor present would create problems in addition to those that inhere in petitioner's request. In the course of a staff conference the patient may disclose information

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<sup>1/</sup> One judge of this Court has referred to the psychiatrists at Saint Elizabeths Hospital as "Government-employed doctors," *Henderson v. United States*, 123 U.S. App. D.C. 380, 384, 360 F.2d 514, 518 (1966) (Bazelon, C.J., concurring);

(continued)

concerning the objective elements of the offense with which he is charged, and, even though it may be that such information would not be admissible evidence in the prosecutor's mouth, there would always be the possibility of the prosecutor's following leads thus disclosed.

On the other hand, the Court in Wade, while emphasizing that the presence of counsel at a lineup may have an immediate effect upon the fairness of lineup procedures (an idea that we do not understand to be urged here), also indicated that a principal factor in determining whether counsel must be present is whether counsel's absence at the stage of the proceeding in question would harm the ability of the defense to cross-examine witnesses for the Government. 388 U.S. at 227, 236. The Court distinguished between the lineup, where a witness's identification of the accused, to which he will later testify, is for all practical purposes fixed forever, and technical matters such as blood tests, fingerprints and the like. Compare

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(continued)

another has spoken of a Saint Elizabeths doctor as "acting in the capacity of a Government officer, not as a personal physician," Taylor v. United States, 95 U.S. App. D.C. 373, 381, 222 F.2d 398, 406 (1955) (Prettyman, J., dissenting). Amicus does not understand that these references, in their context, are inconsistent with the view stated in the text.

United States v. Wade, 388 U.S. 218 (1967), with Gilbert v. California, 388 U.S. 263, 265-67 (1967); Schmerber v. California, 384 U.S. 757 (1966). In the lineup situation counsel's presence at the lineup would be an aid to cross-examination of the identifying witness; with respect to technical tests, on the other hand, the scientific principles and techniques involved are sufficiently well known, the Court indicated, that counsel's presence while the tests were being performed would not meaningfully improve his ability to cross-examine those who conducted the tests.

Measured by this standard, a staff conference appears to be more like the lineup than like fingerprinting or the making of blood tests. The psychiatrists who will testify at trial respecting the accused's mental condition are forming a judgment, as is the identifying witness at a lineup -- and the scientific principles and techniques involved in a psychiatric examination are not nearly so established or routinized that counsel's ability to cross-examine the psychiatrist witnesses would not be improved by his presence at the conference.

If there is no constitutional requirement under Wade for the presence of counsel at the staff conference, it is because the nonadversary character of the psychiatric

examination and the absence of the kind of showing of deficiencies and abuses in the examination process that was made with respect to lineup procedures place the staff conference outside the doctrine of the Wade case.<sup>2/</sup> Amicus is inclined to this view. In any event, the Court's order inviting the submission of views by amici on the "feasibility and desirability" of certain practices assumes that the Court may not be under constitutional compulsion to order such practices instituted. The question, then, becomes whether the Court, in the exercise of its power of supervision over the administration of justice in the District

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2/ United States v. Wade, 388 U.S. 218 (1967), rested solely on the Sixth Amendment. The Court expressly rejected an argument based upon the Fifth Amendment privilege against self-incrimination, saying that no testimonial compulsion was involved. 388 U.S. at 221-23. Petitioner relies upon Wade and not the line of self-incrimination cases culminating in Miranda v. Arizona, 384 U.S. 436 (1966). He says that his counsel and his psychiatrist will merely observe at the staff conference; counsel will not undertake to advise petitioner as to the extent to which he should cooperate with the hospital psychiatrists. Whether a claim in a case such as this one based upon the privilege against self-incrimination could be rejected on the ground taken in Wade is at least open to some question. The heart of psychiatric examination is the interview, and an uncooperative patient, one who declines to talk -- or testify, if you will -- about himself, can thwart his examiners. See Report of the Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial 34-36 (1965).

(continued)

of Columbia, should grant petitioner the relief he seeks. The touchstone of this decision, amicus submits, should be improvement of the testimony given by Saint Elizabeths Hospital psychiatrists as expert witnesses on the question of an accused's mental condition at the time of the commission of the alleged offense.

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(continued)

A self-incrimination claim would raise questions in addition to those raised by the claim petitioner has made. For example, there is no special reason that, if counsel's presence is required to protect a defendant against infringement of his self-incrimination privilege, counsel need be present only at the staff conference; there are other occasions during his mental examination when he is interviewed by psychiatrists, social workers and psychologists and might be regarded as under compulsion to make revelations. Report, supra at 31-32.

By statute no statement made by accused in the course of a mental examination may be admitted in evidence "on the issue of guilt," which in context means the issue of guilt except as guilt is affected by the defendant's mental condition at the time of the alleged crime. 18 U.S.C. § 4244; for the applicability of this statute in the District, see *Edmonds v. United States*, 104 U.S. App. D.C. 144, 146-47, 151, n.3, 260 F.2d 474, 476-77, 481 n.3 (1958). But this may not be a complete answer because, for one thing, a defendant may be privileged not to "incriminate" himself by helping the prosecution carry its burden of proving beyond a reasonable doubt that he was mentally responsible for his acts. But see *United States v. Albright*, 388 F.2d 718 (4th Cir. 1968). For a discussion of some of the problems, which pre-dates the Miranda decision, see Report, supra at 107-18.

II.

This Court time and again has recognized the inadequacy of psychiatric testimony in criminal cases in the District of Columbia resulting from the failure of psychiatrists to understand their proper function of providing facts for the jury to evaluate and from the failure of counsel to cross-examine psychiatrists sensitively, effectively and knowledgeably. As this Court has stated:

"[T]he frequent failure to adequately explain and support expert psychiatric opinion threatens the administration of the insanity defense in the District of Columbia." Rollerson v. United States, 119 U.S. App. D.C. 400, 402, 343 F.2d 269, 271 (1964).

In Rollerson this Court referred specifically to the lack of information about the staff conference in criticizing the failure of the District Court, of the expert witnesses and of counsel to bring out the facts necessary for the jury's full consideration of the question of the defendant's criminal responsibility:

"We are not told how many personal interviews of the defendant were conducted. We are not told the extent or content of the staff observations. We are told nothing about the tests the defendants took -- what they were, what they are designed to show,

how useful they are considered to be. We are not told the men's scores on the intelligence or aptitude tests, much less what those scores mean. In Rollerson's case we are told nothing about the details of the staff conference -- who was present, what questions were asked, what impression he made. We do not know what 'ward rounds' are or how much time is involved on a typical ward round." 119 U.S. App. D.C. at 405, 343 F.2d at 274. (Emphasis added.)

Nor is Rollerson unique. In Jackson v. United States, 118 U.S. App. D.C. 341, 346, 336 F.2d 579, 584 (1964), Chief Judge Bazelon asserted in a separate opinion that

"meaningful exploration of the issue of criminal responsibility is lacking in this jurisdiction. That issue is ordinarily for the jury. But the necessary corollary of the rule allowing laymen to decide responsibility is that they must be given the fullest information possible."

As the court declared in Heard v. United States, 121 U.S. App. D.C. 37, 39, 348 F.2d 43, 45 (1964),

"We have frequently urged that trial counsel and their expert witnesses should seek to avoid being content with mere expert conclusions and should emphasize the reasons, the factors, the symptoms, and the medical reasoning which led to the conclusions so that from the experts the jury will have a psychological profile of the accused and not simply a collection of psychiatric labels and technical jargon."

This recurring problem was elucidated in great detail in the separate opinions of Judge Burger in Blocker v. United States, 110 U.S. App. D.C. 41, 45, 288 F.2d 853, 857 (1961) (en banc), and Campbell v. United States, 113 U.S. App. D.C. 260, 266, 307 F.2d 597, 603 (1962). Although the Judicial Conference's pre-trial mental examination committee was not concerned directly with the presentation of the insanity defense, a significant part of its report went to the point that psychiatrists should concern themselves with facts, which should be spread upon the record in detail, and not with legal conclusions. See Report, supra at 118-28.

In short, the inadequacy of psychiatric testimony in many criminal trials is well known to all of the judges of this Court. Most recently, in Washington v. United States, D.C. Cir. No. 20232, decided December 13, 1967, in an opinion by Chief Judge Bazelon, the Court substantially adopted the view expressed by Judge Burger in his separate opinions in Campbell and Blocker that the function of the expert psychiatrist witnesses is only to provide the information on which the jury may reach the ultimate conclusion about the defendant's legal responsibility for the offense of which he is accused.

III.

This petition gives the Court an opportunity to explore how the testimony of expert psychiatrist witnesses can be made more detailed, more specific and limited to the role advocated by Judge Burger and adopted by the Court in Washington. Unfortunately, the decided cases that amicus has studied afford little guidance in this endeavor.

Amicus curiae is aware of three cases in which the question of counsel's presence at a psychiatric or other medical examination has been raised.

In United States v. Albright, 388 F.2d 719 (4th Cir. 1968), cited by the United States Attorney, a defendant was convicted of a federal offense on evidence that included statements made by the defendant during the course of a psychiatric examination requested by the Government after defendant had raised the issue of insanity. Defendant urged that the conviction was defective because, inter alia, counsel had not been permitted to be present at the psychiatric examination. The opinion focused exclusively on the self-incrimination aspects of the examination. The question raised by this petition -- that counsel's presence at the staff conference is necessary in order to allow meaningful cross-examination of the expert witnesses on their testimony about the defendant's mental condition as it may

bear upon the issue of criminal responsibility -- was not raised or dealt with.

In a New Jersey decision relied upon by the court in Albright, State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965), the court also was concerned with the problem of self-incrimination in the course of the psychiatric examination; there the court resolved the problem by recommending an instruction to the jury limiting any testimony by the psychiatrist about inculpatory statements made by the accused during the examination to the issue of criminal responsibility related to insanity, forbidding the jury's consideration of such statements with respect to the question of defendant's having committed the acts charged. The court refused to overturn the trial court's exercise of discretion to deny counsel the right to be present at the psychiatric examination, indicating that a primary consideration was whether the presence of the attorney "would hinder or operate to reduce the effectiveness of [the state psychiatrists'] examination." 210 A.2d at 776.

In Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960), a case involving a demand by a tort plaintiff that his attorney be present at his examination by defendant's physician, the District Court treated the question as one addressed to its discretion. The court seemed to rely on the view that the examining physician in a tort case

is performing a function as an officer of the court and not as an adversary, and that the presence of counsel would inject a partisan flavor into the proceeding.

In both Whitlow and Dziwanoski, however, the court expressly approved allowing a psychiatrist or a physician named by the person being examined to be present at the examination. We note that in its brief Saint Elizabeths Hospital objects not only to the presence at the staff conference of counsel but to the presence at the staff conference of a psychiatrist representing the defendant.

Probably the most important factor that has led to the conclusion that Albright, Whitlow and Dziwanoski can give this Court little guidance here is that in none of those cases was anything like the Saint Elizabeths Hospital staff conference involved. An understanding of the nature of the staff conference, how it is conducted and how the decisions made there are reached, is crucial to a determination of how testimony of the conference's conclusions can be made more useful to the trier of fact, and whether the presence of counsel at the conference would further or hinder that purpose.

In Wade, in dealing with a much simpler situation, the Supreme Court had available to it an extensive body of literature on lineups and identification from which the

Court was able to conclude that the right to cross-examine was substantially attenuated where counsel was not present at the lineups. United States v. Wade, 388 U.S. at 228, and see pt. IV, passim.

Here we have Saint Elizabeths' own description of the staff conference set forth in its amicus brief and petitioner's view, which has a somewhat different flavor. Another description of procedures at the John Howard Pavilion of Saint Elizabeths Hospital is found in Report, supra at 31-33. Amicus has searched through the medical and legal literature but has found nothing that would further our understanding of the staff conference. Much of the medical literature dealing with the psychiatrists' role in the criminal trial has, as has this Court, criticized the distortion of the psychiatrists' function and his usurpation of the Court's and jury's functions. See, e.g., Robey, Criteria For Competency To Stand Trial: A Checklist for Psychiatrists, 122 Am. J. Psychiatry 6, 616-621 (1965); Hess & Thomas, Incompetency To Stand Trial: Procedures, Results, And Problems, 119 Am. J. Psychiatry 8, 713-720 (1965); McGarry, Competency For Trial and Due Process Via The State Hospital, 122 Am. J. Psychiatry 6, 623-631 (1965). None of the materials our research uncovered dealt with the question of criminal responsibility; all dealt with the problem of competence to stand trial and the consequences to the patient of an indefinite commitment.

IV.

The lack of available information either in decided cases or in medical or legal literature has put amicus curiae in a quandary about how in conscience to advise the Court. Other than those facts that the Court has before it in the representations of petitioner and the amicus submission of Saint Elizabeths Hospital, amicus has been unable to find facts to be marshalled in support of any view respecting the desirability of allowing counsel to be present at the staff conference, or recording the staff conference or proposals for other procedures. <sup>3/</sup>

Amicus is persuaded that, whatever the reasons, the insanity issue frequently is badly tried in criminal cases in the District of Columbia. Amicus does not consider himself competent, on the data available to him, to judge or advise whether having counsel (or an independent psychiatrist) present at staff conferences at Saint Elizabeths Hospital or transcribing staff conferences is a desirable way of improving the way in which the insanity issue is tried. The hospital asserts that the presence of counsel (or of an independent psychiatrist) would stifle

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<sup>3/</sup> There would seem to be no serious question of feasibility except with respect to the cost of one of the possibilities mentioned by the Court, that of videotaping the conference.

the free flow of communication that is vital to the success of the staff conference technique. It says that the same stultifying effect would result if conferences were transcribed by audio or video tape. Petitioner says that the presence of his counsel and his psychiatrist would have no such inhibiting effect upon the conference. The hospital says that the documented data and the opportunities for interviews with hospital personnel that are available to defense counsel are ample to enable him intelligently to cross-examine the psychiatrist or psychiatrists who may testify at his client's trial. Petitioner indicates that this is simply not so -- that too much that is vital to effective cross-examination goes unrecorded at the staff conference to make any documents or after-the-fact interviews adequate substitutes for presence at the conference. All of this is in the form of assertions of counsel, altogether untested in the trial process. Some assertions, it can be said, are more plausible to amicus than others. It is, for example, not obvious to amicus why the presence of a non-hospital psychiatrist (or an audio tape recorder) should have a serious adverse effect on the staff conference, whereas the assertion that a lawyer's presence would be inhibiting seems *prima facie* reasonable. But any such judgments must be of the most tentative sort on

the present state of the record. It would be simple to say, as some courts have said (pp. 13, 15, supra), that the matter should be left to the trial court's discretion. But amicus is unable to formulate any criteria that a trial court could use in deciding that one defendant was entitled to have his counsel present at a staff conference but another was not. The matter seems to be one that should be resolved by uniform rule for all defendants.

In this posture, amicus recommends that the Court avail itself of the traditional and time-honored procedure by which a court informs itself of the facts necessary to reach a decision. We recommend a remand of this matter to the District Court, to hold an evidentiary hearing at which, among others, personnel from the various professional disciplines, at all levels, who participate in the psychiatric examination of an accused and in the staff conference at which the hospital's conclusion is reached, would testify.

In that way counsel for the United States, counsel for Saint Elizabeths, counsel for petitioner and, if the Court deems it appropriate, amicus curiae will be able to explore, through the testimony of the witnesses, how the psychiatric examination and the staff conference are conducted and spread upon the record the facts on

which this Court may base its decision of the questions referred to in its order of July 9, 1968.

The remand should be made under the broadest possible terms -- perhaps the terms expressed in this Court's order of July 9, 1968 -- in order that the District Court will not consider itself restricted in the scope of the testimony to be presented and elicited from the witnesses. There should be exploration of such mundane things as the cost of audio or video transcription as well as of such intangibles as what effect these techniques would have upon the staff conference. One critical inquiry would be into the adequacy, as a basis for developing his examination, of the data defense counsel can obtain under existing procedures. In that regard, there of course would be examination of such documents as the sample staff conference report appended to the Saint Elizabeths Hospital brief. If there is relevant experience elsewhere in the psychiatric world, it should be drawn upon. There should be exploration of the extent to which the possibility of obtaining independent psychiatric expert assistance under the Criminal Justice Act mitigates the indigent defendant's traditional need to rely solely on cross-examination of the Saint Elizabeths psychiatrists and therefore his need to have more data than he can now get in preparation for that examination.

In view of the importance to the administration of justice in this Circuit of improving the quality of psychiatric testimony in criminal cases where an insanity defense is raised, and in view of the importance of a proper determination of this petition as establishing a rule for the future, the possible burden on the personnel at Saint Elizabeths is insignificant. We recognize the possible burden upon petitioner, a presumptively innocent man restrained of his freedoms, of further delay in his trial. He is entitled, of course, to a prompt determination of his case, including this aspect of it, but that determination should also be an informed one.

Respectfully submitted,

/s/ William H. Allen

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July 26, 1968